83-1459

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

PIEDMONT PUBLISHING COMPANY, INC., an affiliate of MEDIA GENERAL, INC., and JOE DOSTER, DUDLEY DALTON, JOE GOODMAN, and RAY DOWNEY-LASKOWITZ, Individually, and in their respective capacities as the Publisher, City Editor, Managing Editor, and Photographer of the Winston-Salem Journal and Sentinel,

Petitioners,

v.

ED COCHRAN,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

TO THE
NORTH CAROLINA COURT OF APPEALS

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QUESTION PRESENTED

Whether a state court can interpret its own procedural rules and deny defendants' request for summary judgment on the issue of punitive damages in an action for libel?

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GROUNDS FOR JURISDICTION

The judgment by the North Carolina Supreme Court denying the petition for certiorari was entered on December 6, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

On or about November 7, 1980, plaintiff, Ed Cochran, while seated on a public bench with some acquaintances, was photographed by an employee of the Winston-Salem Journal and Sentinel. After taking the picture, the photographer, Mr. Raymond Downey-Laskowitz, approached plaintiff and the others seated on the bench and asked for their names. All the individuals refused to give their names, and plaintiff contends that he asked the photographer not to print the photograph. Plaintiff alleges that the photographer then stated that the photo would be printed and that plaintiff did not have the money to hire a lawyer to sue for damages. Defendant contends

that he merely walked away after stating that no one's name would be printed.

The day after this incident plaintiff's picture appeared on the front page of the second edition of the Winston-Salem Journal and Sentinel with the following caption, "Waiting for Godot". Plaintiff immediately became very upset and personally requested that the City Editor of the paper, Mr. Dudley Dalton, print an apology or a retraction. The paper refused to print any retraction contending that the caption was not defamatory. Plaintiff, by his attorney, then forwarded a written request for retraction on December 18, 1980.

When the paper refused to print the requested retraction, the plaintiff

filed a complaint for defamation of character on March 2, 1981. The complaint alleged that the caption printed on November 8, 1980 was wholly false, untrue and misleading and that the publication was made with malice in that defendant failed to investigate prior to printing and published the article with reckless disregard for its truth or falsity. Plaintiff's complaint sought general, special and punitive damages.

On or about April 6, 1981 defendants answered the complaint. They denied the material allegations and alleged by way of defense that the statements were true and that the photograph was a fair representation. They also alleged that they acted without

malice, that the photograph and caption were privileged, and that the State and United States Constitutions protected their right to publish the article.

On March 3, 1982 defendant filed a motion for Summary Judgment. On March 17, 1982 the trial court granted partial summary judgment for defendant on the issue of punitive damages. Plaintiff appealed from this order. The North Carolina Court of Appeals unanimously reversed the trial court's grant of summary judgment on the punitive damages claim. The North Carolina Supreme Court denied defendants' petition for certiorari.

REASONS WHY THE WRIT SHOULD NOT ISSUE

Prior to 1964, newspapers, radio, and television broadcasters, in performing the function of dispensing news, enjoyed no privilege which could not be claimed by the general public. State law defined the extent of liability of the media in actions for libel and slander. 50 Am. Jur. 2d, Libel and Slander, §251, at p. 769 (1970). In 1964, in a landmark decision, the United States Supreme Court held that the First Amendment guarantees of freedom of speech and press do limit the application of state libel law. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The New York Times case established the so-called "actual malice" rule, under which public figures and public officials

may not recover damages for libel without proving that the alleged defamatory statement was made by the defendant either with knowledge of its falsity or with reckless disregard of whether the statement was true or false. The underlying basis for the rule was that a fear of libel suits produced self-censorship and, therefore, had a "chilling effect" on discussion of issues of public concern. Id. at 277-80.

In 1974, the court was required to decide whether the New York Times standard should be applied in the case of a private individual who had been libelled by the press. In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the court held that, "so long as they do not impose liability without fault, the States may de-

fine for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." Id., at 346-7.

The main thrust of the Gertz decision was its holding that, if the plaintiff qualifies as a "private individual", he may recover actual damages for libel upon proof that a publication was false and was published negligently. He is not required to prove actual malice unless he seeks to recover punitive damages.

Although punitive damages awards in libel actions against the press were not the court's primary focus in Gertz, the opinion further defined the law on this issue. In addition to prohibiting

state laws which would permit a presumption of damages and actual malice in certain cases classified as "libel per se", the court held that no plaintiff, whether a private individual, public figure or public official, could recover punitive damages when liability is not "based on a showing of knowledge of falsity or reckless disregard for the truth." Id., at 349.

It must be emphasized that, within the Gertz definition, a state is constitutionally permitted to allow the award of punitive damages against the press when the "actual malice test" is met. Id., at 348-50. The holding merely precludes application of the common law of defamation to the extent that it per-

mits a presumption of injury or malice from the fact of publication of certain classes of statements, eg., statements imputing commission of a crime, statements deprecating a person in his job or profession, and statements implying "unchastity." See Arnold v. Sharpe, 37 N.C. App. 506, 246 S.E.2d 556 (1978); 8 Strong's N. C. Index 3d, Libel and Slander, §5, pp. 338-40 (1977).

Since Gertz, the majority of the lower federal courts have held that, when the actual malice test of the New York Times case has been satisfied, punitive damages are permitted even if the individual is a public figure or public official. Appleyard v. Transamerican Press, Inc., 539 F.2d 1026 (4th Cir.

1976); Davis v. Schuchat, 510 F.2d 731 (D.C. Cir. 1975); Goldwater v. Ginzburg, 414 F.2d 324 (2nd Cir. 1969); Maheu v. Hughes Tool Co., 569 F.2d 459 (9th Cir. 1977); Bucky v. Littel, 539 F.2d 882 (2nd Cir. 1976); Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976); Jenoff v. Hearst Corp., 453 F.Supp. 541 (C.D.Md. 1978).

To plaintiff's knowledge the only cases holding that punitive damages are not allowed upon proof of actual malice were either reversed, Maheu v. Hughes Tool Co., 384 F. Supp. 166 (C.D.Cal. 1974), rev'd 569 F.2d 459 (9th Cir. 1977), or were decided in jurisdictions which generally prohibit the recovery of punitive damages at common law. Taskett v. King

Broadcasting Co., 86 Wash. 2d 439, 546, P.2d 81 (1976); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E. 2d 161 (1975).

In a 1976 case, which was appealed from the Western District of North Carolina, the 4th Circuit Court of Appeals held that punitive damages may be allowed in a libel case even though a public figure is involved. Appleyard v. Transamerican Press, Inc., 539 F.2d 1026 (4th Cir. 1976). In Appleyard Overdrive, a trucker's magazine published articles accusing a public figure of diverting funds to personal use. The court upheld an award of $5,000 in punitive damages on the ground that "awards of punitive damages advance a valid state

goal. Such awards serve to deter others who might engage in malicious false attacks on public figures." Id, at 1030. In discussing the Gertz decision the Court interpreted the Supreme Court's holding as only "removing the spectors of presumed and punitive damages in the absence of New York Times malice." Id., at 1029.

North Carolina has traditionally permitted recovery of punitive damages in libel actions where the plaintiff proves actual malice or that the defamation was recklessly or carelessly published. 8 Strong's, N. C. Index 3d, Libel and Slander, §18, p. 360 (1977); Roth v. Greensboro News Co., 217 N.C. 13, 6 S.E.2d 882 (1940); Stewart v. Nationwide Check Corp., 279 N.C. 278, 182 S.E.2d

410 (1971). Although, to plaintiff's knowledge, there have been no North Carolina decisions on the issue of punitive damages and the press since the New York Times decision, plaintiff appellant asserts that the issue should be decided in accordance with previous 4th Circuit opinions and North Carolina common law. As the court stated in Appleyard, "[t]he purpose of constitutional limitation on the permissible scope of state law libel is not to protect false statements of fact. Rather the purpose of the New York Times rule is to prevent "would be" critics of official conduct [from being[deterred from voicing their criticism . . . because of doubt whether it can be proved in court or fear of the

expense of having to do so." Appleyard v. Transamerican Press, Inc., 539 F.2d 1026, 1030 (4th Cir. 1976), cert. den. 429 U.S. 1041 (1977).

Clearly there is no constitutional prohibition which would prevent the award of punitive damages against a newspaper as long as malice is shown. The Supreme Court has left this issue to the discretion of the state courts. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). North Carolina law indicates that the courts of this state will award punitive damages in a libel suit upon a showing of malice or proof that the defamation was recklessly or carelessly published. Roth v. Greensboro News Co., 217 N.C. 13, 6 S.E.2d 882 (1940); Stewart

v. Nation-Wide Check Corp., 279 N.C. 279 N.C. 278, 182 S.E.2d 410 (1971). This is also the clear trend among lower federal courts, including those of the 4th Circuit. Appleyard v. Transamerican Press, Inc., 539 F.2d 1026 (4th Cir. 1976); Jenoff v. Hearst Corporation, 453 F. Supp. 541 (D.Md. 1978).

Respondent contends that sufficient evidence of malice was presented at the hearing of defendant's motion for a jury to consider its existence. Because the evidence must be taken in the light most favorable to the plaintiff, and because defendant, in a motion for summary judgment, has the burden of proving that no genuine issue of material fact exists, the evidence in this

case was sufficient to withstand said motion.

Accordingly, this Court should deny petitioners' writ for certiorari.

CONCLUSION

For the foregoing reasons, the Respondent submits that the Petitioners' petition for writ of certiorari should be denied.

Respectfully submitted,

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